INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	16
Conclusion	22

AUTHORITIES CITED

Cases:

American Manufacturing Co. v. *National Labor Relations Board*, 309 U. S. 629	21
Elastic Stop Nut Corp. v. *National Labor Relations Board*, 142 F. 2d 371, certiorari denied, 323 U. S. 722	17
Hobart Cabinet Co. v. *National Labor Relations Board*, decided May 8, 1941, unreported, certiorari denied, 314 U. S. 679	21
National Labor Relations Board v. *M. E. Blatt Co.*, 143 F. 2d 268, certiorari denied, 323 U. S. 774	17
National Labor Relations Board v. *William Davies Co.*, 135 F. 2d 179, certiorari denied, 320 U. S. 770	17
National Labor Relations Board v. *Eastern Footwear Corp.*, 112 F. 2d 716	21
National Labor Relations Board v. *Montgomery Ward & Co.*, 157 F. 2d 486	18
National Labor Relations Board v. *Nebel Knitting Co.*, 103 F. 2d 594	21
National Labor Relations Board v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105	20
National Labor Relations Board v. *Trojan Powder Co.*, 135 F. 2d 337, certiorari denied, 320 U. S. 768	16
National Labor Relations Board v. *Virginia Electric & Power Co.*, 314 U. S. 469	16, 17, 19
Norristown Box Co. v. *National Labor Relations Board*, 124 F. 2d 429	21
Reliance Mfg. Co. v. *National Labor Relations Board*, 143 F. 2d 761	17
Thomas v. *Collins*, 323 U. S. 516	18, 19
Virginia Electric & Power Co. v. *National Labor Relations Board*, 319 U. S. 533	17
Westinghouse Electric & Mfg. Co. v. *National Labor Relations Board*, 312 U. S. 660	21

733457—47——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 989

HAL PETERSON, CHARLES PETERSON, TAYLOR CUMMINS, J. C. CUMMINS, KATHRYN M. BECK, AND C. D. BECK, D. B. A. C. D. BECK & COMPANY, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 414–415) is reported in 157 F. 2d 514. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 18–52) are reported in 63 N. L. R. B. 1426.

JURISDICTION

The decree of the court below (R. 413) was entered on October 16, 1946. A petition for re-

hearing was denied on December 2, 1946 (R. 417). The petition for a writ of certiorari was filed on February 6, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether certain anti-union statements made by petitioners' Managing Partner, which in the context of other anti-union conduct the Board found to be coercive, were privileged by virtue of the First Amendment.

2. Whether there is substantial evidence to support the findings of the Board that petitioners discharged two employees in violation of Section 8 (3) and (1) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix to the petition for certiorari (Pet. 17–19).

STATEMENT

Upon the usual proceedings under Section 10 of the Act (R. 18–19), the Board issued its findings of fact, conclusions of law, and order (R. 18–51). The facts, as found by the Board and as

shown by the evidence, may be summarized as follows:[1]

In June 1944 the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, herein referred to as the Union, at the request of certain employees who were dissatisfied with a wage cut, began to organize petitioners' employees (R. 20; 62–63, 87). On June 27 the Union wrote to petitioners stating that a majority of their employees had designated it as their exclusive bargaining representative and requesting recognition as the statutory bargaining agent (R. 20; 411). In the event that petitioners refused to grant this recognition, the letter stated, the Union would petition the Board for an investigation and certification of representatives pursuant to Section 9 of the Act (R. 20; 412). After a considerable exchange of correspondence, a conference between the Union and petitioners was set for August 3 (R. 20; 74).

Shortly after receiving the Union's request for recognition as the bargaining representative of the employees, C. D. Beck, petitioners' Managing Partner, late in June, summoned to his office employee Johnson, who, he knew, was "interested" in the Union (R. 20–21; 185, 269). Beck informed

[1] In the following statement the citation preceding the semicolon refers to the Board's findings; those following refer to the supporting evidence.

Johnson that it would be futile for the employees to join the Union inasmuch as the Union could not do any more for them than he had already done (R. 21; R. 185–186). Moreover, Beck continued, he preferred an A. F. of L. union to one affiliated with the CIO since the latter had "Communistic tendencies" (*ibid.*).

Shortly thereafter, Beck ordered Union Committeemen John Hughes and Clarence Hendricks to report to his office (R. 21; 231–232, 291–292). According to Beck, he had been previously notified by the plant engineer that water had been improperly released from a plant boiler on two occasions, thereby giving rise to the possibility of an explosion (*ibid.*). Beck admittedly made no investigation of the incidents and stated he "didn't suspect anybody," "any one of a hundred people" might have been responsible, and he "knew that they [Hughes and Hendricks] had nothing to do with it" (R. 21; 232, 293). Despite this, Beck, after confirming his understanding that Hughes and Hendricks were union committeemen and without affording them "a chance to speak," warned them that if "anything that looked like sabotage" occurred in the plant while the Union was organizing the employees, he would notify the Federal Bureau of Investigation, and hold the two employees personally responsible "because they were the committeemen" (R. 21; 89–90, 101, 231–232). Although, as Beck con-

ceded, he knew that neither Hughes nor Hendricks was implicated in the alleged boiler incident, he nevertheless decided to hold them "as committee members * * * responsible until it was proved otherwise" (R. 21; 232). Accordingly, Beck ordered as "punitive action" that the customary annual vacation pay, whch was paid to all other employees, be withheld from Hendricks and Hughes (R. 21–22; 232). When Hughes subsequently sought an explanation for this discriminatory action, Superintendent R. I. Beck informed him that, according to C. D. Beck, he had been retarding production in the shop (R. 22; 90, 125). No such charge had ever been previously made against Hughes (R. 22; 90, 239). Hughes, who continued to be active in the Union, never received the vacation pay which was withheld from him (R. 22; 232–233). Hendricks, on the other hand, immediately resigned as a union committeeman and after, according to Beck, assuring the latter that he would not be a party to "anything that could be held as sabotage," was given his vacation pay (R. 22; 116, 142, 233).

Managing Partner Beck next called to his office employee Reno King and asked him if, as Beck had heard, he had replaced Hendricks as a union committeeman and how many employees had joined the Union (R. 22; 128–129, 361). Thereafter, Beck abandoned this individual questioning and summoned to his office a group of employees

from the various departments whom he regarded as "key men" (R. 22–23; 136–137, 269). Among them were members of the union committee (R. 22; 141–142). At this meeting, which, Beck testified, he called to discover whether a majority of the employees wanted the Union (R. 22; 362), petitioners' Managing Partner sought to ascertain, by interrogating some of those present, the numerical strength of the Union (R. 22; 137–138). In an effort to undermine the value of the Union in the eyes of these key employees, Beck selected this critical moment in the Union's organizing activities to inform them of petitioners' efforts to obtain wage increases for the employees (R. 23; 325, 356–357). Although petitioners had filed an application with the War Labor Board months earlier, in February or March 1944, for permission to put into effect a wage increase plan, Beck chose this occasion in July to tell the employees, for the first time, that such application was on file (*ibid.*).

On August 3, Managing Partner Beck met with the Union's representative pursuant to the latter's request that petitioners recognize the Union as the bargaining representative of the employees (R. 23; 64). Beck at once made known his hostility towards the Union, characterizing it as "a damned political racket" (R. 23; 65). In this atmosphere, the conference ended inconclusively (R. 23; 64–65).

Following this conference, Managing Partner Beck called all the employees to a mass meeting. After proposing to the employees the adoption of an incentive pay plan, Beck suggested that they attend a union meeting to be held that night but admonished them to "come back with a changed mind" (R. 23–25; 91–92, 104–105, 151, 176, 231, 378–379). Beck further informed the employees that he was opposed to the Union as "it was nothing but a political racket" and concluded with the warning that in adhering to the Union, the employees were "sticking their necks out" (*ibid.*).

The following day, August 4, Managing Partner Beck posted a bulletin in the plant explaining an incentive pay plan which petitioners favored (R. 25; 255, 409). Beck had been previously notified that the Union was opposed, as a matter of policy, to a wage incentive plan, since in practice it was nothing more than additional pay for additional work (R. 24; 65, 309). On August 5, Beck directed the foremen to poll the employees to determine whether or not they favored the incentive plan proposed by respondents (R. 25; 151–152, 306–307, 351). The poll disclosed the employees disapproved of the plan by a vote of 2 to 1 (R. 25; 255–256).

Emulating Beck's open hostility towards the Union, supervisory employees joined in discouraging their subordinates from joining, or remaining members of, the Union. Foreman Van Horn

733457—47——2

after inquiring of employee Hughes as to his views concerning the Union, stated that he "never did believe in a Union" and that unions "couldn't do nothing for us nohow, not as much as [Beck] was doing for us" (R. 88–89). Similarly, Foreman McInturf asked employee Eiler for his opinion with respect to the Union and then intimated it might be desirable for him to obtain a refund of the dues which he had paid to the Union (R. 149–150).

Petitioners also scrutinized the union affiliations of prospective employees. Throughout the summer months of 1944, when the Union was recruiting members, petitioners questioned applicants for work whether they belonged to a union (R. 31–32; 262–263). "We did like to know," Beck explained, "if they had union affiliations, simply to know why they were coming to us, more than anything else" (R. 262–263).

Hughes and Eiler, veteran and experienced employees, were employed by petitioners as buck assembly men (R. 25–26; 83–85, 143–144, 237).[2] Both men were regarded by petitioners and their fellow employees as competent and steady workmen (R. 26; 86, 140, 144–147, 204, 300–301, 343). On numerous occasions Hughes had been directed by his foreman to serve as instructor for new employees (R. 26; 86, 343). In August shortly

[2] A buck assembly worker erects the frame sections and panels of the metal bus bodies which petitioners manufacture (R. 26; 235–237).

before they were discharged, they had been given a wage increase and at the time petitioners dismissed them they were receiving the top rate of pay then obtainable in their job classification (R. 30; 247).

Both Hughes and Eiler joined the Union in June (R. 20; 87, 149). Hughes became a member of its organizing committee and was particularly active in procuring memberships (R. 20, 21; 63, 67, 88). Eiler also assisted in recruiting members for the Union (R. 26; 149). The union memberships and activities of both men were known to petitioners (*supra*, pp. 4, 8).

As already stated, Hughes had been denied his vacation pay by petitioners and penalized for no other reason than that he was a committeeman for the Union (*supra*, p. 5). On August 14, Hughes and Eiler were discharged by petitioners under the following circumstances:

On that date, petitioners' welders gathered at the beginning of the day's work in their department and engaged in a work stoppage because of a wage dispute (R. 27; 96, 113). The buck assembly men, including Hughes and Eiler, began working at 6:30 a. m. but soon had to discontinue operations because of the absence of the welders whose job it was to weld together the frame sections, panels and other integral parts on the bus bodies which the buck assembly men erected (R. 27; 96, 153–154, 235–236). When Hughes asked his foreman what he should do, he

was told nothing could be done until the welders returned to work (R. 27; 96). The buck assembly men, among them Hughes and Eiler, then left their department and went to the welding shop where the welders had gathered (R. 27; 96–97). Shortly thereafter, Plant Superintendent R. I. Beck appeared and the welders presented their request for a wage increase (R. 27; 97, 154). Beck induced them to return to work (*ibid.*). Thereupon Staley, one of the buck assembly men, who had joined the welders in the welding shop, acting as spokesmen, requested a wage increase for the buck assembly men (R. 27; 97). Staley, like Hughes, was an outstanding supporter of the Union (R. 20; 63, 134). Superintendent Beck declined to discuss the request and ordered them to return to work until Managing Partner C. D. Beck appeared (R. 27; 97, 154–155). All of the men returned to work and continued on their jobs until the noon hour when they left for lunch (*ibid.*).

In the meantime Superintendent Beck went to the home of C. D. Beck and reported what had occurred at the plant (R. 27; 244). C. D. Beck, who, as he testified, "had intended, if I had any trouble" to get rid of them, ordered Superintendent Beck to discharge Hughes, Eiler, and Staley (R. 27, 30; 245, 305). When these men returned from lunch they were summarily discharged (R. 27; 97, 155). None of the other workmen from

the welding shop or buck assembly was discharged (R. 27; 194, 305).

Before the Board, Managing Partner Beck sought to explain the selection of Hughes, Eiler, and Staley[3] for discharge on the ground that they had retarded production (R. 27; 239, 246, 289–291). In support of this contention Beck testified that concurrently with the commencement of the Union's organizing campaign late in June, petitioners' production fell off and he attributed this decline to the union activities of Hughes, Eiler, and Staley (R. 27–28; 239, 246, 289–291). The credible evidence and the circumstances surrounding the dismissal of these employees discredit Beck's explanation for the termination of their employment. While it is true that a decline occurred in the number of buses manufactured in July, as the Board found (R. 28–29), a number of factors wholly unrelated to the union activities of the employees in question contributed to the slackened production. During the week of July 4 the employees worked only 30 hours instead of the usual 55 hours, resulting in the loss of approximately 1,900 man hours (R. 29; 287, 289).[4] Peti-

[3] Staley was named in the original charge filed with the Board as one of the employees discriminatorily discharged by petitioners. At the hearing the attorney for the Board stated that his name had been omitted from the complaint because he had moved to California and was unavailable for the hearing (R. 26).

[4] Petitioners had in their employ on July 6, 76 workers (R. 266).

tioners also occasionally repaired damaged buses (R. 29; 251, 315). The work on these buses was not reported on petitioners' "Motor Vehicle Production Schedule" which forms the basis for petitioners' contention that the production of buses declined during July (R. 28–29; 407).[5] A damaged bus was received by petitioners late in June and work on it completed early in August (R. 29; 316). To make the repairs on this bus a total of 939 man hours were consumed (R. 29; 352). Thus, during July approximately 2,837 man hours were diverted to purposes other than the production of buses. Moreover, during July the truck assembly department, which normally operated 4 assembly stalls, had in use at times only 3 of these 4 stalls (R. 28; 239, 335–336). In addition, petitioners were experiencing a shortage of welders and the credible evidence discloses that slackened production was due in part to this shortage (R. 28; 200, 297–298, 341). Petitioners' contention that

[5] Petitioners produced 99 buses from January to June 1944 (R. 28; 407), or on an average of 16.5 buses per month. Average hours worked per week during this period were 55 (R. 289), or a total of approximately 1,430 per man during the 26 weeks involved. During the same period it is estimated that petitioners employed an average production force of 67.5 based on the number of workers employed near the beginning and end of the period, namely, 59 in January and 76 on July 6 (R. 266). Accordingly, whether 1000 to 1500 be taken as the number of hours necessary to produce a bus, the loss of time during July (approximately 2837 man hours) effectively accounts for the drop of slightly in excess of 2 buses during that month from the average production of the preceding 6 months (R. 28).

Hughes and Eiler spent little if no time on the wrecked bus certainly warrants no serious consideration. Regardless of whether Hughes or Eiler worked on the bus, the fact nevertheless remains that over 900 man hours were diverted from the production of buses (*supra*, p. 12). In these circumstances and in the light of the satisfactory employment record of Hughes and Eiler (*supra*, pp. 8–9) the Board properly rejected petitioners' explanation for the drop in production and reasonably concluded that any decline was not attributable to either Hughes or Eiler (R. 28–29).

C. D. Beck also asserted that Hughes had been a "disgruntled" employee since August 1943, when he received a wage cut (R. 29, 245). This assertion is obviously without merit in view of Beck's own testimony that after Hughes' cut was restored in October 1943, Hughes' work was satisfactory (R. 29–30; 246, 300–301). Beck also testified that after Hughes' vacation pay was withheld he merely "worked enough to get by without getting fired" (R. 30; 247). In support of this assertion, petitioners rely on Hughes' statement to fellow workers, following the unwarranted denial of his vacation pay, that because of petitioners' action he did not intend "to put out any more work than what he had been doing" (R. 30; 348). This statement on its face does not, of course, afford support for petitioners' contention that Hughes' work during July fell below his previous production which petitioners had found satisfactory (R.

30; 300–301). Moreover, the Board found (R. 30) that no slackening occurred in Hughes' production. Hughes' fellow workmen were not aware of any slackening in his work (R. 30; 204, 349). Hughes testified without contradiction that he had been commended by his foremen for his work and that he had never been criticized for it (R. 30; 86). The only occasion for any complaint was in July when in response to Hughes' request for an explanation for the withholding of his vacation pay, Superintendent R. I. Beck stated that Hughes was "holding up the line" (R. 30; 125). However, Superintendent Beck, who at that time was in immediate charge of the work, added that he was merely reporting what C. D. Beck had stated and that he himself knew nothing about it (R. 30; 125, 239). C. D. Beck was scarcely in a position to know whether Hughes had retarded production in view of the fact that, as he testified, "since the Union activities started, I didn't spend much time in the shop" (R. 28–29; 33, 239).

Finally, Beck also asserted that Eiler's discharge was prompted, in part, by his absenteeism from work (R. 29, 256). Eiler had been absent from time to time over a period of several months preceding his discharge because, as he testified, of an eye affliction caused by the glare of the welding arc when used near his department (R. 29; 148). He had reported this affliction to petitioners (*ibid.*). Petitioners, prior to the hearing in the instant case, had at no time criticized him con-

cerning his absences (R. 29; 148, 299) although Beck asserted that he had "one of the worst" absentee records in the shop (R. 29; 256). Beck assigned Eiler's absenteeism as "one of the main reasons" for his discharge for the first time at the hearing in the instant case (R. 29; 256). In this setting the Board concluded (R. 29–30, 47) that the reason thus advanced by Beck to justify Eiler's dismissal was wholly an afterthought.

Upon these facts the Board concluded that petitioners by discriminatorily withholding vacation pay from Hughes; by discharging Hughes and Eiler because of their membership in and activity on behalf of the Union; by their anti-union statements and course of conduct to defeat self-organization and its objects among their employees, had engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act (R. 47–48). Accordingly, the Board ordered petitioners to cease and desist from the unfair labor practices found; to offer full reinstatement to Hughes and Eiler; to make them whole for any loss of pay caused by petitioners' discrimination against them, including the payment to Hughes of the vacation pay discriminatorily withheld from him; and to post appropriate notices (R. 49–51).

Thereafter, on March 6, 1946, the Board petitioned the court below for enforcement of its order (R. 1–5). On October 16, 1946, the court entered

its *per curiam* opinion and decree, enforcing in full the Board's order (R. 414–415). Petitioners requested a rehearing which was denied on December 2, 1946 (R. 417).

ARGUMENT

1. Petitioners' assertion (Pet. 4–5, 25–44) that the anti-union statements by their Managing Partner were constitutionally privileged under the First Amendment and that the court below erred in approving the Board's finding that the statements violated Section 8 (1) of the Act is, we submit, without merit. The facts set forth (*supra*, pp. 3–15) show that the Board was fully justified in concluding that petitioners' whole course of conduct constituted interference, restraint, and coercion. Such conduct is not privileged merely because it involves the use of oral statements. As this Court has stated, the Board is entitled to view these utterances as an integral part of the "whole complex" of petitioners' anti-union activities, including economic reprisals and threats thereof, and to conclude that petitioners' "whole course of conduct, evidenced in part by the utterances, was aimed at achieving objectives forbidden by the Act." *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 479. *National Labor Relations Board* v. *Trojan Powder Co.*, 135 F. 2d 337, 339 (C. C. A. 3), certiorari denied, 320 U. S. 768; *Elastic Stop Nut*

Corp. v. *National Labor Relations Board,* 142 F. 2d 371 (C. C. A. 8), certiorari denied, 323 U. S. 722; *Reliance Mfg. Co.* v. *National Labor Relations Board,* 143 F. 2d 761 (C. C. A. 7); *National Labor Relations Board* v. *William Davies Co.,* 135 F. 2d 179, 181 (C. C. A. 7), certiorari denied, 320 U. S. 770; *National Labor Relations Board* v. *M. E. Blatt Co.,* 143 F. 2d 268, 274–275 (C. C. A. 3), certiorari denied, 323 U. S. 774.

Indeed, the statements made by petitioners were coercive apart from any context of other anti-union conduct. Thus, as the court below recognized and pointed out, the statement of petitioners' Managing Partner that the employees were "sticking their necks out" by joining the Union and directing them to return from the Union meeting with a "changed mind" carried with it "the reasonable and inevitable inference * * * that a threat of discharge and discrimination [was] intended" (R. 415). Pressure thus exerted vocally by petitioners to discourage and restrain their employees from engaging in concerted activities may no more be disregarded than pressure exerted in other ways. For "slight suggestions as to the employer's choice * * * may have telling effect among men who know the consequences of incurring that employer's strong displeasure." *Virginia Electric and Power Co.,* case, *supra,* at p. 477; cf. *Virginia Electric and Power Co.* v. *National Labor Relations Board,* 319 U. S. 533,

535, 537; *Thomas* v. *Collins,* 323 U. S. 516, 537.

No conflict of decisions is presented, for in *National Labor Relations Board* v. *Montgomery Ward & Co.,* 157 F. 2d 486, upon which petitioners rely, the case turned upon its own peculiar facts. In that case the Board found that the employer had discriminatorily discharged several employees in violation of the Act; it also found that a speech of the employer which was made on the eve of a Board-conducted election, although containing no threats on its face, acquired coercive force in the context of other conduct, particularly the discriminatory discharges. The Circuit Court of Appeals for the Eighth Circuit, on the particular facts of the case, held that the findings of discriminatory discharge did not have the requisite evidentiary support. Since the discharges were held to be lawful, they could not constitute a context in which coercive significance could be read into the employer's anti-union speech, for the speech standing alone was devoid of language from which a threat could be inferred.

Here the converse is true. The court below held that petitioners' statements were coercive irrespective of any other anti-union conduct (R. 415). The court also fully sustained the Board's findings that petitioners had discriminatorily discharged the two employees so that the anti-union statements of petitioners could validly

be said, as the court held, to be
circumstances that they tend
influence and coercion upon th
415).

Petitioners are in error in
42) that the decision in *Thor*
U. S. 516, raises "grave doubts
applicability of the principles
Court in *National Labor Relat*
ginia Electric and Power Co
The opinion of this Court in
expressly reaffirmed the princ
the *Virginia Electric case.*
(323 U. S. at pp. 537–538), "Ac
here has recognized that empl
persuade to action with respec
joining unions are within the
guaranty. *Labor Board* v. *V*
Power Co., 314 U. S. 469. * *
persuasion other things are a
about coercion, or give it that
of the right has been passed.
Virginia Electric & Power Co.

Finally, petitioners assert t
statements made by Managing
privileged because they were
of his "personal opinion" of th
30, 39–41). The court below
Beck's statements were of su

tended "to exercise undue influence and coercion upon the employees" and that such "expressions of opinion" were not protected by the First Amendment. Following petitioners' reasoning, no utterance, however flagrantly coercive it might otherwise be, could ever exceed the permissible limits of free speech if labeled "personal opinion." Obviously, there is no merit to this contention.

2. Petitioners contend (Pet. 25, 51–57, 62–72) that Hughes and Eiler were discharged for cause and that the Board's findings that they were discriminatorily dismissed are not supported by substantial evidence. That employers may freely exercise their right to discharge for any reason, other than those prohibited by the Act, is not disputed. However, the evidence reviewed in the Statement (*supra*, pp. 9–15) affords full support for the challenged findings. Petitioners are now urging their own views of the facts and ignoring the Board's resolutions of the conflicts in the testimony. Clearly, the Board's appraisal of the evidence and its determination of credibility issues are conclusive, if reasonable; hence, questions of credibility, the relative weight of conflicting evidence, and of the inferences to be drawn therefrom are foreclosed on review. *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105, and cases cited.

Equally without substance is petitioners' contention (Pet. 25) that the ruling of the court be-

low should be reversed because it merely stated: "The findings of the Board as to the discriminatory discharge are sustained by the record" (R. 415), without setting forth in its opinion "other comment as to this important element of the case" (Pet. 25). Of course, there is no statutory obligation under the Act requiring a reviewing court in upholding Board findings to set out the supporting evidence in a formal opinion. This Court and the Circuit Courts of Appeals have often sustained Board findings and orders without a full, and sometimes without any, exposition of the evidence. See, e. g., *American Manufacturing Co.* v. *National Labor Relations Board,* 309 U. S. 629; *Westinghouse Electric and Manufacturing Co.* v. *National Labor Relations Board,* 312 U. S. 660; *National Labor Relations Board* v. *Eastern Footwear Corp.,* 112 F. 2d 716 (C. C. A. 2); *Norristown Box Co.* v. *National Labor Relations Board,* 124 F. 2d 429 (C. C. A. 3); *National Labor Relations Board* v. *Nebel Knitting Co.,* 103 F. 2d 594 (C. C. A. 4); *Hobart Cabinet Co.* v. *National Labor Relations Board,* decided May 8, 1941, unreported (C. C. A. 6), certiorari denied, 314 U. S. 679.

In any event, petitioners' challenge to the findings and the failure of the court to review the evidence in its opinion present no questions of general importance.

CONCLUSION

The decision of the court below is correct in all respects and presents no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947